

GÁBOR HAMZA: ENTSTEHUNG UND ENTWICKLUNG DER MODERNEN PRIVATRECHTSORDNUNGEN UND DIE RÖMISCHRECHTLICHE TRADITION¹

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In the literature of Roman law, private law and comparative law are both emphasized: the continental legal systems are based upon Roman law tradition, whose influence is also significant in those countries where its inception was not totally completed. Nowadays the statement of Montesquieu in his famous work *De l'esprit des lois* still has significance: “*on ne peut jamais quitter les Romains*”. Peter Stein, Emeritus Regius Professor of Civil Law at the University of Cambridge remarked in his book *Roman Law in European History* that the Roman law texts constituted „a kind of legal supermarket, in which lawyers of different periods have found what they needed at the time”. The new *opus* of Gábor Hamza, Member of the Hungarian Academy of Sciences and Professor of Roman Law (Faculty of Law of the Eötvös Loránd University Budapest), which was published in the fall of 2009 in German, studied the formation and development of modern private law systems based upon Roman law tradition. The German text of the book has been made in cooperation with Csongor Buzády.

As for antecedents of this work, several books written by the author are worth mentioning. The continuity of the Roman law tradition was already presented in the 9th chapter of the first edition of *A római jog története és intézményei* [History and Institutes of Roman law] Textbook, which was written together with Professor András Földi (Faculty of Law of the Eötvös Loránd University Budapest), and ran into its 15th edition in 2010. In 2002, an imposing monograph under the title *Az európai magánjog fejlődése* [Trends of the Development of Private Law in Europe] was published which showed the external history of private law of the European countries and a number of countries outside Europe. Gábor Hamza's first German language work (*Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*) was also published in the same year. The author's French monograph (*Le développement du droit privé européen. La rôle de la tradition romaniste dans la formation du droit privé moderne*) was published in 2007.

After the above-mentioned books, a third German language monograph was published, which studies the formation and development of modern legal systems based on Roman law tradition at a much larger scale than any of the author's former works do. Professor Hamza's monograph is based on the so-called „external historical view”, using the terminology of Gottfried Wilhelm Leibniz (“*jurisprudentia historica externa*”). However, although

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considered to be in many respects a new approach, internal historical commentaries can also be found in the book. In addition, Professor Hamza analyzes not only the development of European countries' private law based on Roman law tradition, but also reviews several legal systems (orders) outside Europe. The elaboration of the history of private law could not be complete considering the extremely wide range of interest. Commentaries on the history of scholarship in Gábor Hamza's newest book did not have as much importance as it had in the French language monograph. The overview of the development of private law in some countries (e.g. Nicaragua, Panama, and Guatemala) has not been profound considering the difficulties of approachability of the literature and the work mainly studies the "law in books" and pays less attention to the "law in action". Nevertheless, Gábor Hamza's book is an outstanding work of the literature of Roman law, legal history, and comparative law as well.

Regarding the structure of the book, a deep analysis follows the Forewords, which can be considered as an autonomous study dealing with the main problems of the harmonization of private law. Professor Hamza emphasizes his thesis that Roman law serves as basis for the harmonization of law in Europe.

In the first part of the book, Professor Hamza reviews the origins of European private law, which led back mainly to Justinian Roman law. Professor Hamza deals with the process of Justinian codification. He explicitly refers to the well-known, albeit disputed opinion of Leibniz who considered Justinian's codification to be regarded as a compilation.

In the second part of the book, the development of European private law in the Middle Ages is dealt with. Professor Hamza examines the role of Roman law in relation to the legal systems of the Austrian hereditary provinces, the Low Countries, and Switzerland. The author deals also with some important aspects of the history of French private law, preserving its division to *pays de droit écrit* and *pays de droit coutumier* until the entry into force of the Code Civil in 1804. This part of the book takes a view on the development of private law in Spain, Portugal, Poland, Lithuania, Hungary, England, Wales, Scotland, Northern Europe, the Balkan States, the Danubian Principalities and Russia.

In the third and largest part of the book, Gábor Hamza studies the development of private law in modern times, examining the structures and main features of civil codes while taking into account their theoretical and historical antecedents. The author also studies the so-called *Pandektensystem* ("Pandectist system") whereby he emphasizes the importance of the General Part (*Allgemeiner Teil*) which represents the high level of abstraction. This system - which was elaborated in the Pandectist legal science - is the basis of several civil codes e.g. the German Bürgerliches Gesetzbuch (1900) or the Civil Code of Brazil (2002). Regarding the German BGB, we would like to refer to Franz Wieacker's witty assessment that this code is a "spätgeborenes Kind des klassischen Liberalismus und Frucht der Pandektenwissenschaft".

Contrary to the German civil code, the Austrian *Allgemeines Bürgerliches Gesetzbuch* in 1811 - as a "fruit" of the codifications based on natural law (*ius naturale*) - follows the institutional system, which was modified by the representatives of the late school of natural law. In accordance with this circumstance it neither contains a General Part nor an autonomous part

in relation to the law of obligations. It is worth mentioning that the Austrian ABGB does not have an autonomous part containing the law of succession although the separation of the law of succession (*droit des successions*) and the law of property (*droit de propriété*) appeared in Jean Domat's work *Les lois civiles dans leur ordre naturel* published at the end of the 17th century.

It is a well-known fact that the law of obligations including commercial law was codified in Switzerland in 1881 (*Schweizerisches Obligationenrecht*). The Swiss civil code came into force in 1912. Both codes played an important role in private law codifications in countries all over the world. Regarding the development of private law in Liechtenstein, it is worth mentioning that in Austria the *Handelsgesetzbuch* of 1897 - which follows the subjective system - has been in force since the Anschluss, in Liechtenstein the *Allgemeines Deutsches Handelsgesetzbuch* of 1861 - which follows the objective system like the French *Code de commerce* - is in force today.

From time to time the reader may miss something since the book mainly deals with the history of legal science, codifications and generally the "law in books". The extension of the research to the judge-made law could be the subject of investigations to be done in the future. Although the analysis of the "law in books" is based on an impressive source material and a rich literature apparatus, the author could not deal with all problems in an exhaustive way. For instance, the development of Portuguese private law in modern times and the *Código civil português* of 1966 and its influence would certainly have demanded a more detailed presentation. The Portuguese civil code begins with a General Part (*Parte Geral*) having 396 articles including inter alia the interpretation of the statute, the general rules of legal transactions, voidness of legal transactions, ability to get married and the main essential rules of marriage, extra contractual liabilities, the legal facts, the legal relationships, legal capacity, the condition and time determination, lapse of time, law of evidence, and presumption. It is followed by the law of obligations (*Direito das obrigações*), the law of property (*Direitos reais*), family law (*Direito da família*), and finally the law of succession (*Direito das sucessões*).

Gábor Hamza draws attention to the importance of *Hexabiblos*, which had been in force in Greece until 1946 when the civil code (*Astikos kodix*) came into force. The book reflects the strong influence of the German BGB in relation to a number of legal institutions (*Rechtsinstitute*). Although the author deals with the structure of the Greek civil code, the comparative analysis of the *Hexabiblos* and the *Astikos kodix* is missing. In the *Hexabiblos*, the foreword - which instructs the judges - is followed by the law of persons while the second book contains the law of property, and the third book the law of obligations. The fourth book consists of the law of marriage, and the fifth book contains the law of succession. This structure can be regarded as a forerunner of the modern system elaborated in the Pandectist legal science. The law of damages is regulated in the sixth book of the *Hexabiblos*. It would deserve particular research whether the structure of the *Hexabiblos* was the forerunner of the *Pandektensystem* and to what extent it (directly or indirectly through the German BGB) influenced the structure of the Greek civil code. The great value of the survey on the development of Hungarian private law is that the book studied not only the external history of

the development of Hungarian private law but the history of legal education and Hungarian legal science including the internationally well-known *oeuvre* of Károly Visky, Róbert Brósz, Elemér Pólay, Ferenc Benedek, and György Diósdi.

In the fourth part of the book, Professor Hamza studies the influence of the European private law tradition in several countries outside Europe. Gábor Hamza studies for example the less-known but considerable influence of Roman law on the legal development in a number of states in the United States. The legal development of Brazil has been deeply analyzed too. The new Brazilian *Código civil* reflects the influence of the *Código civilportuguês* of 1966 both in structure and in contents. Furthermore, Professor Hamza deals with the legal development of some Asian countries as well. The author deals accurately with the main aspects, development and sources of the South-African law which can be considered as a mixed jurisdiction. The work is supplemented by a list of abbreviations, a detailed list of the sources, names, titles, and subjects, and a multilingual bibliography consisting of several thousand items which serves as a starting-point to further research.

Finally we emphasize that an imposing work has been composed which - regarding the content and the form - surpasses the earlier books. This elegantly produced work is an important contribution to the scholarship of Roman law, legal history, and comparative law. Gábor Hamza's third German language monograph rightly counts on the interest of the specialists of Roman law, history of private law and comparative law, historians and also all readers who want to become acquainted with the legal culture of numerous countries and the role that Roman law tradition played in the development of many legal orders in the world.